Another method of making a gift without delivery is for the donor to declare himself trustee for the donee.[15] Whether a creditor may successfully declare himself trustee of a debt for the debtor as beneficiary does not seem to be decided. Apparently no one has deliberately attempted the feat and it is well settled that an incomplete gift will not be construed as a valid trust, where there was no actual intention to create a trust.[16] A grant of the debt to a third person as trustee for the debtor is open to the same question.

It will be noticed that several of the methods of forgiveness mentioned, though perfectly valid, are difficult to prove after the creditor's death. The debtor must prove both that the act was done, and that it was intended to operate as a release. Clearly the safest course for the debtor is to have his would-be benefactor cancel and surrender the note to him, or deliver it with a receipt in full. But benefactors are sometimes averse to such procedure, either as a reflection upon their good faith, or with a vague desire to keep the obligation legally alive to use in case of emergencies. Many an attempt is made to satisfy the latter desire by making the debt terminable upon the creditor's death, but these almost uniformly fail, as being incomplete gifts, and testamentary in character. A note made payable to the payee alone and not to any executor, trustee, or assignee, has been held valid for that purpose, but there are contrary decisions in very similar cases.[17]

O. C. P.

LANDLORD AND TENANT: LIABILITY OF TENANT TO PAY RENT NOTWITHSTANDING DESTRUCTION OF MATERIAL PART OF LEASED PREMISES.—Section 1932 of the Civil Code of California provides that "The hirer of a thing may terminate the hiring before the time agreed upon . . . . when the greater part of the thing hired perishes from any other cause than the want of ordinary care of the hirer." In *Egan v. Dodd*[1] the court for the first time construed this section with relation to leased buildings. The lease in that case contained a covenant by the lessee to make all repairs and to return the premises in as good order and repair as received by him, reasonable use and wear excepted. After notice by the city authorities to the tenant to repair, the wall of the building collapsed, due to an excavation on the adjoining land. The court held that the lessee

---

[15] Marten v. Funk (1878), 75 N. Y. 134, 31 Am. Rep. 446.

[16] Milroy v. Lord (1862), 4 DeG. F. & J. 264, 45 Eng. Rep. R. 1185; Norway Sav. Bank v. Merriam (1895), 88 Me. 146, 33 Atl. 840.

[17] Bedford's Executor v. Chandler (1908), 81 Vt. 270, 69 Atl. 874, 130 Am. St. Rep. 1057, 17 L. R. A. (N. S.) 1239 and note.

[1] (Feb. 14, 1917), 24 Cal. App. 258. See also Meek v. Cunha (1908), 8 Cal. App. 98, 102, where § 1932 was held not to apply to lease of land and crops.

was bound to make the repairs and to pay rent to the end of the term agreed upon. The decision was based on the grounds that, as there was an express covenant on the part of the lessee to repair, section 1932 did not apply, and that the wall was not a material part of the building.

At common law, under a general covenant to repair, a tenant was bound to repair, notwithstanding the partial or total destruction of the property by whatever cause occasioned.[2] The liability of the tenant for rent after the buildings were injured or destroyed, was equally well established. A distinction is sometimes made between a lease of premises and a lease of a building with a covenant to repair.[3] In the latter case, the tenant need not rebuild when the building is destroyed, for repair does not involve the erection of a new structure, nor does he have to pay rent, for there is a total destruction of the subject matter of the contract. Statutes have been passed in several states modifying the strict common law rules,[4] but the courts are inclined to construe these very strictly.[5] Nor is the California court any exception to this rule. By the construction given section 1932 in the principal case, the common law is in full force where there is an agreement by the lessee to repair, section 1932 being merely an extension of the protection afforded a tenant under sections 1941 and 1942 where he makes no covenant to repair.

While the decision of the principal case is on all points sustained by the great weight of authority, it seems a harsh rule that a tenant should have to renew a material part of a leased building when the loss has been caused through no fault of his. The doctrine of the civil law, substantially re-enacted in the French[6] and

---

[2] Polack v. Pioche (1868), 35 Cal. 416, 95 Am. Dec. 115 and note; Lockrow v. Horgan (1874), 58 N. Y. 635; Heintze v. Erlacher (1882), N. Y. 1 City Ct. R. 465; Leavitt v. Fletcher (1865), 10 Allen 121; note, 22 L. R. A. 613; note, 38 Am. St. Rep. 476-492; Tiffany, Landlord and Tenant (1910), § 116d, p. 761, § 182 et seq., pp. 1190-93; McMillan v. Solomon (1868), 42 Ala. 356, 94 Am. Dec. 654, and note, p. 662. As to early development of subject, cf. 2 Law Mag. 290; 3 Kent's Com. 466; 24 Cyc. 1085-89.

[3] Tiffany, Landlord & Tenant (1910), p. 863. For English rule, by which no distinction is made between total and partial destruction, cf. 9 Harvard Law Review 127. But see 133 L. T. 387; note, 9 Ann. Cas. 107.

[4] Kentucky Stats. (1903), § 2997; Missouri Rev. Stats. (1889), § 2393; N. Y. Laws (1896), c. 547; N. Y. Gen. Laws, c. 46, § 197; Ohio Rev. Stats. (1887), § 4113; Va. Code, § 2455; see 24 Cyc. 1089; see also 38 Am. St. Rep. 476-92; N. J. Gen. Stats., p. 1923.

[5] Markham v. David Stevenson Brewing Co. (1900), 51 App. Div. 463, 64 N. Y. Supp. 617, affirmed (1901) in 169 N. Y. 593, 62 N. E. 1097; Lockrow v. Horgan, supra, n. 2; Seymour v. Hughes (1907), 105 N. Y. Supp. 249, 252, and cases cited; Booraem v. Morris (1906), 74 N. J. L. 95, 64 Atl. 953.

[6] French Civil Code (1908), § 1732, "Lessee liable *unless* he can prove that such damages or loss happened through no fault of his."

German Civil Codes,[7] is that "when the thing perishes without the tenant's fault, he is not obliged to make it good, but from that time his rent ceases," or that when the use is lessened, the rent should be apportioned.[8]

J. M. P.

PRACTICE: EXEMPTION OF SUITORS AND WITNESSES TEMPORARILY IN STATE FROM SERVICE OF PROCESS.—To the lawyer who has not had occasion to investigate the question, it may come as a surprise to know that the authorities have established certain exceptions to the general rule that any person within the territorial jurisdiction of the state may be served with process. In considering the question for the first time, the United States Supreme Court in *Stewart v. Ramsay*[1] decided what had already come to be the weight of opinion in state and lower federal courts; viz, that suitors, as well as witnesses, coming from another state or jurisdiction for the primary purpose of attending court are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going.[2] The rule seems to be the modern counterpart of the common law privilege of exemption of parties and witnesses from arrest on civil process, eundo, morando, et redeundo,[3] the arrest having for the most part given way to the summons.

The privilege finds its basis in the very substantial right of every man to be sued at home, a right which he is not willing to risk by voluntarily entering another jurisdiction even to attend court. If his presence is desired, it must be solicited. The privilege becomes, therefore, the privilege of the court, and but incidentally that of the individual. It is the price which the court is willing to pay to get those before it who alone can furnish the best evidence, and to prevent the interruption of judicial machinery. It is extended, therefore, to plaintiffs as well as to defendants;[4] and it is also extended in the case of witnesses, to attendance before legislative commissions,[5] bankruptcy proceedings,[6] and the

---

[7] German Civil Code (1907), § 537, providing that rent be apportioned according to injury suffered.

[8] Puffendorf, The Law of Nature and Nations (1729). Book V, Chap. VI, par. 2.

[1] (Dec. 4, 1916), 37 Sup. Ct. Rep. 44.

[2] Parker v. Hotchkiss (1849), Fed. Cas. 10,739; State v. District Court (1915), 51 Mont. 503, 154 Pac. 200; Person v. Grier (1876), 66 N. Y. 124, 23 Am. Rep. 35; Rix v. Sprague Machinery Co. (1914), 157 Wis. 572, 147 N. W. 1001.

[3] Central Trust Co. v. Milwaukee St. Ry. Co. (1896), 74 Fed. 442; Thompson's Case (1877), 122 Mass. 428, 23 Am. Rep. 370; Ellis v. De Garmo (1892), 17 R. I. 715, 24 Atl. 579.

[4] Hale v. Wharton (1896), 73 Fed. 739.

[5] Thorp v. Adams (1890), 58 Hun. 603, 11 N. Y. Supp. 479.

[6] Matthews v. Tufts (1882), 87 N. Y. 568, 62 How. Pr. 508.